

STATE OF MICHIGAN
COURT OF APPEALS

MARIBETH HASELEY,

Plaintiff-Appellant,

v

KELLY SERVICES, INC. and JAMES R.
CONNER,

Defendant-Appellees

and

CULLEN HANLON and JOHN DREW,

Defendants.

UNPUBLISHED

September 23, 2003

No. 235023

Oakland Circuit Court

LC No. 98-010-945-CZ

Before: Meter, P.J., and Jansen and Talbot, JJ.

Jansen, J. (concurring).

I concur with the majority that we should affirm this case because summary disposition was properly granted. However, I disagree, in part, with the reasoning stated in the majority opinion.

We review a decision to grant or deny summary disposition de novo. *Haynie v State of Michigan*, 468 Mich 302, 306; 664 NW2d 129 (2003). A motion for summary disposition under MCR 2.116(C)(10) tests whether there is factual support for a claim. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998); *Mino v Clio School District*, 255 Mich App 60, 67; 661 NW2d 586 (2003). All reasonable inferences are to be drawn in favor of the nonmovant. *Hall v McRea Corp*, 238 Mich App 361, 369-370; 605 NW2d 354 (1999), remanded 465 Mich 919; 638 NW2d 748 (2001). This Court is liberal in finding a genuine issue of material fact. *Marlo Beauty Supply, Inc v Farmers Ins Group*, 227 Mich App 309, 320; 575 NW2d 324 (1998).

Our Supreme Court in *Chambers v Tretco, Inc.*, 463 Mich 297; 614 NW2d 910 (2000), provided the following with regard to the law surrounding sexual harassment claims:

Through the Civil Rights Act, Michigan law recognizes that, in employment, freedom from discrimination because of sex is a civil right. MCL 37.2102; MSA 3.548(102). Employers are prohibited from violating this right, MCL 37.2202; MSA 3.548(202), and discrimination because of sex includes sexual harassment, MCL 37.2103(i); MSA 3.548(103)(i). In turn, "sexual harassment" is specifically defined to include

"unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct or communication of a sexual nature under the following conditions:

- (i) Submission to the conduct or communication is made a term or condition either explicitly or implicitly to obtain employment
- (ii) Submission to or rejection of the conduct or communication by an individual is used as a factor in decisions affecting the individual's employment
- (iii) The conduct or communication has the purpose or effect of substantially interfering with an individual's employment" MCL 37.2103(i)(i); MSA 3.548(103)(i).

The statute expressly addresses an employer's vicarious liability for sexual harassment committed by its employees by defining "employer" to include both the employer *and* the employer's agents. MCL 37.2201(a); MSA 3.548(201)(a).

Sexual harassment that falls into one of the first two of these subsections is commonly labeled quid pro quo harassment. *Champion v Nation Wide Security, Inc.*, 450 Mich 702, 708; 545 NW2d 596 (1996). Sexual harassment that falls into the third subsection is commonly labeled hostile environment harassment. [*Radtke v Everett*, 442 Mich 368, 381; 501 NW2d 155 (1993).] We have previously identified the elements that a party must establish in order to make out a claim for sexual harassment with respect to each of these categories.

In order to establish a claim of quid pro quo harassment, an employee must, by a preponderance of the evidence, demonstrate:

"(1) that she was subject to any of the types of unwelcome sexual conduct or communication described in the statute, and (2) that her employer or the employer's agent used her submission to or rejection of the proscribed conduct as a factor in a decision affecting her employment." [*Champion*, 450 Mich at 708-709.]

In order to establish a claim of hostile environment harassment, an employee must prove the following elements by a preponderance of the evidence:

"(1) the employee belonged to a protected group;

(2) the employee was subjected to communication or conduct on the basis of sex;

- (3) the employee was subjected to unwelcome sexual conduct or communication;
- (4) the unwelcome sexual conduct or communication was intended to or in fact did substantially interfere with the employee's employment or created an intimidating, hostile, or offensive work environment; and
- (5) respondeat superior.” *Radtke*, 442 Mich at 382-383.

Whichever category of sexual harassment is at issue, it is always necessary to determine the extent of the employer's vicarious liability when harassment is committed by an agent. Because the Civil Rights Act expressly defines "employer" to include agents, we rely on common-law agency principles in determining when an employer is liable for sexual harassment committed by its employees. Vicarious liability exists in the case of quid pro quo harassment because the quid pro quo harasser, by definition, uses the power of the employer to alter the terms and conditions of employment. *Champion, supra*.

With regard to plaintiff's quid pro quo claim I agree that summary disposition was properly granted but disagree with the majority's reasoning. First, I believe that a genuine issue of material fact was raised as to whether plaintiff was subjected to unwelcome sexual conduct or communication. I cannot agree with the majority's analysis, which seems to indicate that unwelcome sexual advances cannot be demonstrated when later a consensual sexual relationship develops. The United States Supreme Court in *Meritor Savings Bank v Vinson*, 477 US 57, 68; 106 S Ct 2399; 91 L Ed 2d 49 (1986), addressed consensual sexual relations and allegations of prior unwelcome sexual advances as follows:

[T]he fact that sex-related conduct was "voluntary," in the sense that the complainant was not forced to participate against her will, is not a defense to a sexual harassment suit The gravamen of any sexual harassment claim is that the alleged sexual advances were "unwelcome." 29 CFR § 1604.11(a) (1985). While the question whether particular conduct was indeed unwelcome presents difficult problems of proof and turns largely on credibility determinations committed to the trier of fact, the [court] in this case erroneously focused on the "voluntariness" of . . . participation in the claimed sexual episodes. The correct inquiry is whether [plaintiff] by her conduct indicated that the alleged sexual advances were unwelcome, not whether her actual participation in sexual intercourse was voluntary.¹

¹ As noted by the majority, Michigan courts are not compelled to follow federal precedent on issues involving the Michigan Civil Rights Act, but federal precedent is persuasive guidance in reaching a decision involving the act. *Radtke, supra* at 381-382.

Plaintiff testified, in her deposition, that prior to any consensual sexual relationship, James Conner drove her to her hotel room and made sexually related comments that were not welcomed. Plaintiff claims she told Conner to stop. Plaintiff further testified that, after this, plaintiff picked her up and kissed her on the lips. The next day, according to plaintiff, Conner “attack[ed]” her in a car by grabbing her breasts and rubbing her legs. Once again, plaintiff claim she asked Conner to stop.

The majority seems to be improperly making credibility findings that plaintiff later had consensual sex, and thus, prior sexual advances cannot be unwelcome. There is testimony support that there were prior unwelcome advances. Summary disposition is rarely appropriate in cases involving questions of credibility, intent or state of mind. *Michigan National Bank-Oakland v Wheeling*, 165 Mich App 738, 744-745; 419 NW2d 746 (1988). A court may not make findings of fact or weigh credibility in deciding a summary disposition motion. *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994); *Nesbitt v American Community Mutual Ins Co*, 236 Mich App 215, 225; 600 NW2d 427 (1999). Thus, when the truth of a material factual assertion depends on credibility, a genuine factual issue exists and summary disposition may not be granted. *Metropolitan Life Ins Co v Reist*, 167 Mich App 112, 121; 421 NW2d 592 (1988). Although, a subsequent consensual sexual relationship raises serious credibility issues, summary disposition is not proper, in this regard.

In addition, although I agree with the majority on the actual authority issue, I do not agree with the majority’s position that a question of fact has not been raised with regard to whether Conner was acting within the apparent scope of authority entrusted to him by Kelly Services, Inc. (hereinafter Kelly). See *McCalla v Ellis*, 180 Mich App 372, 380; 446 NW2d 904 (1989). I do not believe that plaintiff’s conclusion that Conner was her supervisor was “unreasonable as a matter of law,” as stated by the majority. See *Burlington Industries inc v Ellerth*, 524 US 742, 759; 118 S Ct 2257; 141 L Ed 2d 633 (1998).² “If, in the unusual case, it is alleged there is a false impression that the actor was a supervisor, when he in fact was not, the victim’s mistaken conclusion must be a reasonable one.” *Id.*, citing Restatement (Second) of Agency § 8, Comment c (1957). Without going into substantial detail about the theory of apparent authority, it only applies where “the agent purports to exercise a power which he or she does not have.” *Id.*

Conner was a senior vice president and general manager of Kelly Staff Leasing (KSL), a Kelly subsidiary. Plaintiff testified, at her deposition, that Conner was her supervisor on a worker’s compensation project, that she had to report to him, and that he was in her chain of command. Plaintiff also testified that when talking to her therapist, plaintiff referred to Conner as her boss. Plaintiff further testified that Conner informed her that he could fire her with a “flick of a pen.” Kelly’s 1996 annual report lists Conner as senior officer, albeit for KSL. Even if it was clear that Conner was a senior officer with KSL rather than Kelly, the average person, even an employee, may have trouble delineating the difference between the employer and the employer’s subsidiary. As such, a mistaken conclusion could still be reasonable.

² As noted federal precedent can be persuasive guidance in reaching a decision involving the act. *Radtko, supra* at 381-382.

I believe, drawing all inferences in favor of plaintiff, that the question of whether plaintiff reasonably believed Conner had the apparent authority to alter her job benefits raised a question of fact. See *Hall, supra* at 369-370. There was testimony that Conner purported to exercise power that he did not have, and there was testimony to support a reasonable belief that Conner did have the authority he purported have. As previously noted, summary disposition is rarely appropriate in cases involving questions of credibility, intent or state of mind. *Michigan National Bank-Oakland, supra* at 744-745. A court may not make findings of fact or weigh credibility in deciding a summary disposition motion. *Skinner, supra* at 161; *Nesbitt, supra* at 225. I believe that this allegation by plaintiff hinges on credibility, and as such a genuine factual issue exists and summary disposition should not be granted in this regard. *Metropolitan Life Ins Co, supra* at 121.

I would find that summary disposition is proper on the quid pro quo claim for a different reason than the majority. To succeed on a quid pro quo sexual harassment claim it must be shown that the employer's agent used submission or rejection to unwelcome sexual conduct or communication as the basis for a decision affecting plaintiff's employment. *Jager v Nationwide Truck Brokers, Inc.*, 252 Mich App 464, 474; 652 NW2d 503 (2002); MCL 37.2103(i). The definition requires a detrimental action, and plaintiff has not demonstrated that she suffered any adverse employment action from her submission or rejection to Conner's sexual advances. See *Jager, supra*. Plaintiff was not removed from her position based on her submission or rejection of Conner, there was no change in her working conditions or benefits, and no evidence was presented that Kelly failed to promote her because of Conner's actions³; nor was there any other adverse decision affecting her employment based on her submission or rejection to unwelcome sexual advances or communications. Consequently, I would find that the trial court did not err in finding that plaintiff could not succeed on her quid pro quo sexual harassment claim.

With regard to the hostile work environment claim, I agree with the majority in all respects, except for the portion stating as an additional ground "that the sexual conduct and communication, as a matter of law, were not 'unwelcome.'" I disagree with this additional ground for the same reasons discussed, hereinbefore, as I believe that a factual issue was raised

³ It is noted that a constructive discharge can be an adverse employment action resulting from submission to sexual advances, but, as in *Jager, supra*, plaintiff, in the present case, has not shown that connection. See *Jager, supra* citing *Chambers, supra* at 313; *Champion, supra* at 710-713. Plaintiff provided no evidence to counter defendant's evidence that her discharge was not related to any alleged sexual harassment. On August 19, 1997 plaintiff took a medical leave of absence. In January 1998 Kelly was informed that plaintiff could return to work. From February 1998 through the date of her termination on April 23, 1998, Kelly requested that plaintiff either return to work or provide medical documents substantiating her need to remain on leave. All of the evidence indicated that plaintiff was terminated because she never responded to these requests. Thus, plaintiff's termination from Kelly was not connected in any way to the alleged sexual harassment.

with regard to whether the sexual advances were unwelcome. However, I agree that summary disposition was proper pursuant the other reasons stated by the majority.

With regard the amended complaint issue, I agree with the majority, that there was no abuse of discretion by the trial court in this regard.

/s/ Kathleen Jansen